IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

Bail Appl..No. 5415 of 2007()

CC.292/2005 of J.M.F.C.,PERUMBAVOOR

.....

PETITIONER/ACCUSED

KABEER, AGED 33 YEARS
S/O. MUHAMMED,
KALAYIKKAPARAMBU HOUSE
THANDEKAD BHAGOM,
VENGOLA VILLAGE, KUNNATHUNADU TALUK.

BY ADV. SRI.SIRAJ KAROLY

RESPONDENTS/COMPLAINANT:

THE STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JAI GEORGE

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 04/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

- -

B.A.No. 5415 of 2007

- -

Dated this the 4th day of September, 2007

O R D E R

The petitioner is the first accused in a prosecution, along with the co-accused, inter alia, under Section 498A I.P.C. He was granted anticipatory bail by order dt. 15.10.2004 in B.A.No. 5938 of 2004. The petitioner could not take advantage of the said order as he was not available in India. He could not therefore surrender before the Investigating Officer. The co-accused had complied with the said order. Investigation is now complete. Final report has already been filed. Cognizance has been taken also. As the petitioner is not available, a warrant of arrest has been issued against the petitioner. The petitioner finds such warrant of arrest chasing him.

2. The learned counsel for the petitioner submits that the petitioner is absolutely innocent. His absence was not wilful, but was due to reasons beyond his control. The petitioner is willing to appear before the learned Magistrate, but he apprehends that his application for bail may not be considered by the learned Magistrate on merits, in accordance with law and expeditiously. He therefore prays that

directions under Section 438 and/or 482 Cr.P.C. may be issued in favour of the petitioner.

3. The learned Prosecutor opposes the application. He submits that there are no circumstances to justify the invocation of the powers under Section 438 Cr.P.C. in favour of the petitioner.

4. I find merit in the opposition by the learned Prosecutor. It is trite after the decision in **Bharat Chaudhary** v. **State of Bihar** (AIR 2003 SC 4662) that powers under Section 438 Cr.P.C. can be invoked even in favour of a petitioner, who apprehends arrest in a pending case on the strength of a non-bailable warrant issued by the court. Even that is not by itself sufficient to justify the invocation of the jurisdiction under Section 438 Cr.P.C. I am unable to find any compelling reasons which would justify invocation of the jurisdiction under Section 438 Cr.P.C.

5. It is certainly for the petitioner to appear before the learned Magistrate and explain to the learned Magistrate the circumstances under which he could not earlier appear before the learned Magistrate. I have no reason to assume that the learned Magistrate would not consider the application for bail to be filed by the petitioner when he surrenders before the learned Magistrate, on merits, in accordance with law and

expeditiously. Every court must do the same. No special or specific direction appears to be necessary. Sufficient general directions have already been issued by this Court in the decision in **Alice George** v. **Dy.S.P. of Police** (2003 (1) KLT 339).

6. This application is accordingly dismissed. I may however hasten to observe that if the petitioner appears before the learned Magistrate and applies for bail after giving sufficient prior notice to the Prosecutor in charge of the case, the learned Magistrate must proceed to pass orders on merits, in accordance with law and expeditiously - on the date of surrender itself.

(R. BASANT)
Judge

HO
tm